In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 912

ALPHONSE F. COZZI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–4a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1965. The petition for a writ of certiorari was filed on January 14, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was denied his Sixth Amendment right to counsel.

206-175—66

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of unlawful possession of goods stolen while moving in interstate commerce, in violation of 18 U.S.C. 659 (A. 1, 2),[1] and was sentenced to imprisonment for seven years (A. 16). On appeal, the conviction was affirmed.

Petitioner and co-defendants Butera and DiLella were indicted in October 1964 (A. 1). On October 28, petitioner and Butera, who were represented by Mr. Cogan, entered pleas of not guilty (A. 4–5). On the day set for trial, December 2, 1964, Mr. Cogan appeared for both men. Butera pleaded guilty and the trial of petitioner and DiLella was continued to December 14, 1964 (A. 2, 5–7). On December 8, a subpoena was issued directing Butera to appear at the trial as a government witness (A. 2). On December 11, when Mr. Cogan called the government prosecutor about this subpoena, he was told that the prosecution had no intention of calling Butera as a witness but wanted him only for identification purposes (A. 9).

On Monday, December 14, 1964, when the case was called for trial, Mr. Cogan told the court that because of the subpoena "served on Butera to have him testify apparently on behalf of the government * * * I feel that in representing Cozzi [petitioner] I have an adverse interest here, a conflict of interest." Mr. Cogan asked that Mr. Meyers be substituted as petitioner's

[1] "A." refers to appellant's appendix in the court of appeals.

counsel if the court would grant Mr. Meyers "time to get prepared in this matter" (A. 8). Mr. Meyers, who had consulted with petitioner on December 12, said he was willing to represent petitioner if the case could be continued. At this point the prosecutor assured the court that Butera would not be called as a government witness, and stated that Mr. Cogan had been so advised on the previous Friday (A. 9). Mr. Meyers then remarked that petitioner "might want to say something," but the court, observing that petitioner had two attorneys, declined to question him, stating that, "in the event of conviction, I will let him say what he wants to" (A. 10). The court refused permission for Mr. Cogan to withdraw as petitioner's counsel, but granted leave (which was declined) for Mr. Meyers to appear as additional counsel (A. 2, 10, 11). At the trial (which, in accordance with the court's order, began at 2:00 p.m. on December 14), Mr. Cogan alone represented petitioner (A. 11, 12). Butera did not testify, although he was identified by a government agent as a person referred to in the agent's testimony (A. 14).

ARGUMENT

The district court acted within its discretion in holding that no valid reason had been shown for a continuance to employ new counsel. As the court of appeals observed, there was "no suggestion that Cogan's original undertaking to represent both Cozzi and Butera involved any conflict of interest—or possible prejudice to either defendant" (Pet. App. 3a). In view of the government's assurance that Butera

was not being called as a witness, the subpoena to Butera did not change the situation.[2] There was thus no reason to postpone the trial date, of which both petitioner and Mr. Cogan had ample notice. An accused's right to select his own counsel cannot, of course, be "insisted upon or manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice" (*United States* v. *Bentvena*, 319 F. 2d 916, 936 (C.A. 2), certiorari denied *sub nom. Ormento* v. *United States*, 375 U.S. 940); in the circumstances, the district court justifiably required petitioner to proceed to trial with Mr. Cogan as his attorney and with Mr. Meyers as additional counsel if he wished to participate[3] (cf. *Ungar* v. *Sarafite*, 376 U.S. 575, 588–591; *United States* v. *Abbamonte*, 348 F. 2d 700, 703–704 (C.A. 2), certiorari denied, No. 740, October Term, 1965, January 17, 1966; *Cleveland* v. *United States*, 322 F. 2d 401 (C.A.D.C.), certiorari denied, 375 U.S. 884).

It was also within the trial court's discretion to rely upon representations of counsel, and not question petitioner personally on the motions for continuance, discharge, and substitution of counsel. *Brown* v. *United States*, 264 F. 2d 363, 366, 367 (C.A.D.C.), certiorari denied, 360 U.S. 911; *United States* v. *McMann*, 263 F. 2d 940, 943 (C.A. 2). No objection was made to the court's failure to question petitioner per-

[2] Cases cited by petitioner (Pet. 11) in which a conflict of interest appeared are thus inapposite.

[3] Mr. Meyers had consulted with petitioner two days before the case was called for trial (A. 9), and could have been prepared to go to trial had he chosen to do so.

sonally, and there is no suggestion, even now, as to any helpful statement petitioner could or would have offered in addition to the argument made by counsel.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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